Murco, Inc. and United Food and Commercial Workers International Union, Local 26, AFL-CIO and Mark T. Barber. Cases 7-CA-19928 and 7-CA-20418

2 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 28 December 1982 Administrative Law Judge Richard A. Scully issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

In finding that Respondent had unlawfully circulated a decertification petition for its employees to sign, the Administrative Law Judge relied, in part, on an adverse inference which he drew from Respondent's failure to call employees Johns and Hopwood as witnessess to corroborate its claim that the petition was circulated at their request. In adopting the Administrative Law Judge's finding, we find it unnecessary to rely on the adverse infer-

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Additionally, Member Hunter finds it unnecessary to pass on the Administrative Law Judge's citation to Abilities and Goodwill, 241 NLRB 27 (1979), since the present case does not involve the discharge of a striker.

ence drawn by him since Respondent's conduct in circulating the petition and coercing its employees into signing it was clearly violative of Section 8(a)(1) of the Act.

As an affirmative defense to the 8(a)(1) and (3) charges, Respondent contends that the Union, before going on strike on 13 October 1981, failed to give notice of its purported intent to modify or terminate its contract with Respondent as required by Section 8(d)(1) of the Act and that, consequently, the Union and the discriminatee, Mark T. Barber, are barred from any relief in this proceeding. We disagree. Whether the Union did or did not comply with the provisions of Section 8(d)(1) has no bearing on the question of whether Respondent, as found herein, violated Section 8(a)(1) by circulating a decertification petition and coercing its employees into signing it, encouraging employees to decertify the Union and to bargain directly with Respondent, and promising them benefits if they abandoned the Union. Nor is it relevant to our finding that Respondent, in violation of Section 8(a)(3) of the Act, refused to reinstate Barber because it erroneously believed that Barber had participated in the strike.

The record clearly establishes that Barber did not participate in the strike. That Respondent may have believed otherwise does not serve to cloak Barber with the status of a striker. Consequently, a finding that the strike contravened Section 8(d)(1) would not affect our finding that the denial of reinstatement to Barber was discriminatory. Moreover, it is significant to note that neither during the hearing nor in its brief to the Board has Respondent claimed that its refusal to reinstate Barber was due to his alleged involvement in an unlawful strike. Rather, it contended that Barber was denied reinstatement because he failed to report for work within 2 days of his release from medical leave, a reason which the Administrative Law Judge found, and we agree, was pretextual. Thus, it is apparent that under no circumstance is the issue of the Union's purported failure to give notice under Section 8(d)(1) relevant to our 8(a)(1) and (3) findings.

In any event, we find that Respondent has not met its burden of establishing its affirmative defense by a preponderance of the credible evidence. In support of its defense, Respondent has relied only on the testimony of its personnel manager, Lenardson, who, when asked if he had received any notice from the Union, simply replied, "No, sir." Lenardson's reply to an apparently ambiguous question is, without more, insufficient to establish that the Union had not complied with the provisions of Section 8(d)(1). In fact, there is no evidence to indicate that the Union was indeed seek-

² In adopting the Administrative Law Judge's conclusion that Respondent unlawfully terminated employee Barber, Member Hunter emphasizes that, as found by the Administrative Law Judge, Barber was not a striker. He further notes that the Administrative Law Judge at one point stated that Barber "remained away from his job" because he was afraid to cross the picket line. However, Barber testified merely that one of the reasons he did not personally appear at Respondent's plant to request his job back was his fear of bodily harm or damage to his car by the strikers and that he would have crossed the picket line if he had a job waiting for him. Further, it is clear from his repeated attempts to apply for work by phone-as he previously had been instructed to do by Respondent-that he was willing and able to return to work as of 2 November 1981 and that Respondent was aware of that fact. Indeed, in response to Barber's repeated inquiries about the availability of his job Respondent on several occasions communicated to Barber its view that, because Barber was a union member and the Union was on strike, Barber was a

³ We leave to the compliance stage of this proceeding the question of whether discriminatee Barber had, as alleged by Respondent, removed himself from the work force sometime in May 1982 by purportedly indicating during an unemployment hearing his unwillingness to return to work for Respondent.

ing to modify or terminate its contract, as Respondent has suggested. In light of the above, we find Respondent's affirmative defense to be without merit.⁴

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Murco, Inc., Plainwell, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge: Upon charges filed on October 15, 1981, and March 15, 1982, by United Food and Commercial Workers International Union, Local 26, AFL-CIO (the Union), and Mark T. Barber, respectively, a consolidated amended complaint was issued on May 11, 1982, by the Regional Director for region 7 of the National Labor Relations Board (the Board), alleging that Murco, Inc. (the Respondent), had committed violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act). The Respondent filed a timely answer denying that it had committed any violations of the Act.

A hearing was held at Grand Rapids, Michigan, on September 13 and 14, 1982, at which all parties were given a full opportunity to participate, to examine and cross-examine witnesses, and to present other evidence and arguments. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration. Upon the entire record and from my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent was a Michigan corporation engaged in the processing, sale, and distribution of meat products, with its principal office and place of business in Plainwell, Michigan. During the calendar year 1981, a representative period, the Respondent, in the course and conduct of its business, sold and distributed products valued in excess of \$500,000, of which products valued in excess of \$500,000 were shipped from its Plainwell plant directly to points located outside the State of Michigan. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Alleged 8(a)(1) Violations

1. Actions of Supervisor Tim Wyman

The complaint alleges that in mid-September 19811 Sanitation Department Supervisor Tim Wyman circulated a petition among the employees under his supervision for the purpose of decertifying the Union and that Wyman suggested to the employees that upon decertification of the Union they could form their own union for collective-bargaining purposes. Several employees of the sanitation department were called by the General Counsel to testify concerning these allegations. All had participated in an economic strike against the Respondent which began on October 13 and were still on strike as of the date they testified. Employee Ronald Arndt testified credibly that Wyman spoke to a group of employees in the cafeteria during a break and told them they should sign a paper he presented indicating that they wanted out of the Union. He stated that "Dad" wanted them to sign out of the Union because he did not want to see them "on the street." The "Dad" he referred to was Paul Murray, the owner and president of the Respondent. Wyman threatened that, if they did not sign the paper, he could find ways to get rid of them. Wyman also told them they could hire their own lawyer to make a contract with the Respondent. The testimony of employees Joe Bierema and Ron Hambright, who were present during this conversation, was equally credible and corroborated that of Arndt. Hambright also testified that, when he alone of those present refused to sign the paper, Wyman told him to stay behind when the other employees returned to work and told him if he did not sign Wyman would "make it rough" or find a way to get him fired. Hambright then signed the paper.

Employee Allen Redmond testified that Wyman spoke to another group of employees in the lunchroom and told them he wanted them to sign a paper to get out of the Union. Although some of those present signed the paper, Redmond did not. During a later break period, Wyman again asked Redmond to sign the paper telling him that the Union would be out no matter what and that if the employees did not sign Wyman would give them "a hard time" and that they could be fired. Redmond signed the paper at that point.

Employee Lloyd Sivley testified that the day after Wyman spoke to the other employees he approached Sivley at the timeclock, said he had a paper to get out the Union which everybody had signed, and asked if Sivley was going to sign it. Sivley said he would not. Wyman asked him why, but did not pursue it further.

None of the employee witnesses could specify the date on which Wyman approached them about signing the

⁴ Member Jenkins concurs in the rejection of Respondent's 8(d)(1) affirmative defense. However, he finds it unnecessary to rely on any ambiguity in Personnel Manager Lenardson's testimony that he had received no notice of contract termination or modification from the Union.

¹ All dates are in 1981 unless otherwise noted.

paper, but all placed it in September, about a month to 6 weeks before the start of the strike.

Tim Wyman testified that he was asked by employees Mark Johns and Dave Hopwood to pass a petition around to the different crews, which he did, and then gave it to the plant general manager, a Mr. Hatch. He passed the paper around for about a half an hour on one night only.² He did not indicate to the employees that he wanted them to sign it, but merely laid it on the table in front of them and said, "If you want to sign it, sign it, if you don't, don't."

On the basis of his demeanor while testifying and the content of his testimony, I did not find Wyman to be a credible witness. Although he said that the petition was drawn up and given to him to circulate by Mark Johns and Dave Hopwood, the uncontradicted testimony of employees Arndt, Bierema, and Redmond establishes that both Johns and Hopwood were present when Wyman presented the petition to two different groups of employees. None of the witnesses but Wyman indicated that he stated he was circulating the petition at the request of those employees. If Johns or Hopwood had written out the petition and asked Wyman to circulate it, it is reasonable to expect that one or both of their signatures would be first on the petition. Their signatures are sixth and seventh, respectively. I also find it hard to believe that, if Wyman told the employees that he was circulating the petition at Johns and Hopwood's request, other employees would have signed before seeing those employee's signatures on the petition. Both Johns and Hopwood were working at the Respondent's plant at the time of the hearing, but neither appeared as a witness to corroborate Wyman's testimony. This warrants the inference, which I draw, that their testimony would have been adverse to the Respondent.3

The Respondent admits that Wyman was a supervisor within the meaning of Section 2(11) of the Act. Although Wyman denied drafting the petition, who drafted it is not important. I find, on the basis of the credited testimony of employees Arndt, Hambright, and Redmond, that Wyman stated to the employees that he wanted them to sign it and that if they did not he would take reprisals against them. Wyman also told employees that Company President Paul Murrary wanted them out of the Union. I find that, by the actions of its supervisor in sponsoring and presenting to its employees for their signatures a petition to decertify the Union which represented them for collective-bargaining purposes, encouraging them to sign the petition, and threatening them with reprisals if they did not sign, the Respondent violation Section 8(a)(1) of the Act. 4 I find that the Respondent also violated Section 8(a)(1) by Wyman's encouraging the employees to decertify the Union and bargain directly with the Respondent.5

2. Actions of Supervisor Jeff Murray

Jeff Murray is the son of the Company's owner and president, Paul Murray, and is a supervisor on the kill floor. Glenn Merica testified that he is an employee in the boning room and is frequently assigned to work on the kill floor. During the week of October 5, Jeff Murray approached him while he was working on the kill floor and asked him what he thought was going to happen. Merica replied that he thought there would be a strike. Murray told Merica that "Dad" was getting tired of the Union and wanted it out. He offered to talk to his father and said that maybe his father would "give you guys what you like" in return for getting rid of the Union. Merica responded that there was no way to work for Murray's father without a union. Merica was not a union official and was not a member of the committee negotiating with the Respondent.

Jeff Murray testified that he did have a talk with Merica and that it was Merica that "brought up something about proposals." He told Merica that he did not have anything to do with negotiating and was "not in a position to deal with those kinds of problems." On cross-examination, Murray stated that he walked up to Merica and started talking to him and that Merica brought up the subject of proposals, asking him what was going to happen and if Murray's father would accept any of them. He said he did not remember what the proposals Merica mentioned were or what he said in response.

I found Merica to be a straightforward, convincing witness and Murray to be just the opposite. I accept Merica's version of the conversation as true. He stated that he had worked for the Respondent for several years, was well known at the plant, and was a person that people came to "if somebody wants something or wants to find out something." I find it unlikely that Merica, who was not involved in contract negotiations between the Union and the Company, would have undertaken to

² The Respondent introduced a paper bearing the signatures of several sanitation department employees which Wyman identified as the petition he circulated. This document has a somewhat different format than that described by the employee witnesses and has the date "6/25/81" written next to the first signature, that of Dan Hoyt. Whether this was the petition Wyman circulated is significant only insofar as it might bear on the credibility of certain witnesses since there is no dispute but that Wyman did circulate a petition and June 25 is well within the 6-month period preceding the date the union's charge concerning this incident was filed.

When compared with exemplars given at the hearing and documents in the Company's files, all of the signatures on the petition appear to be genuine. I believe this is the document Wyman circulated. In the absence of any credible corroborating evidence that the "6/25/81" on the paper is the date it was signed, I accept the consistent testimony of the employee witnessess that it was signed a month to 6 weeks before the strike began. While Wyman testified that "6/25/81" was the date he circulated the petition, he appeared to have no independent recollection of the date, saying first that he passed the petition around in September. I do not credit Personnel Manager Bruce Lenardson's testimony implying that he received the petition in June because he said the first thing he did with it was to show it to Mr. Hatch while Wyman testified that he gave it directly to Mr. Hatch right after it was signed. Dan Hoyt, next to whose name the "6/25/81" appears, was not called as a witness. I find the difference in the format of the petition from that described by the employee witnesses to be so minor as to cast no doubt on their credibility. The principal difference, the words "Pending No Pay Decrease" at the bottom of the paper, may well have been added after the paper was signed.

³ See American Chain Link Fence Co., 255 NLRB 692, 696 (1981).

Nassau Glass Corp., 222 NLRB 792 (1976); Suburban Homes Corp., 173 NLRB 497 (1968).

⁵ See Camay Drilling Co., 254 NLRB 239 (1981), and 239 NLRB 997 (1978)

discuss "proposals" with Murray. On the other hand, Merica, being well known in the plant and not specifically indentified with the Union, was a likely choice for relaying Murray's implied promise to the employees that if they abandoned the Union his father might be more amenable to their demands. Murray never specifically denied telling Merica this. I find that the Respondent violated Section 8(a)(1) when Murray sought to undermine support for the Union in this manner.⁶

B. The Respondent's Refusal To Reinstate Mark Barber

Mark Barber had been employed by the Respondent in the boning room for 17 months prior to a job-related injury which caused him to be on medical leave commencing on July 17. He was released to return to work by his physician as of October 30. The parties have stipulated that the Union went on strike at the Respondent's plant on October 13; that at all times since October 30 to date there has been a position available at the Respondent's plant which Mark Barber could have filled; and that Barber has not been reemployed by the Respondent. The General Counsel contends that Respondent has refused to reinstate Barber, despite an unconditional offer to return to work on his part, because he engaged in a strike or because the Respondent thought he had done so in violation of Section 8(a)(3) and (1) of the Act. The Respondent contends that Barber was discharged because he failed to timely notify it of his desire to return to work following his medical leave upon being released by his physician.

Initially, I find the Respondent's claimed basis for terminating Barber, his alleged failure to report for work within 2 days of his release by his doctor, to be a pretext. Barber testified that when he went on medical leave he was told by Personnel Manager Bruce Lenardson that when he was released by his doctor he should call and give the Company 24 hours' notice of when he could return to work. Barber got his release on a Friday and called Lenardson's office on the following Monday and was told by a secretary that Lenardson was not in his office. He called the next day and was told that Lenardson was in a meeting and the secretary did not know when he would be out. He called again the next day and was told that Lenardson was out of his office and the secretary did not know when he would be back. Barber left a message asking Lenardson to call him. Lenardson did not call and Barber called his office again the following day. Lenardson was not in the office and did not answer when paged in the plant. Barber told the secretary who he was, that he had called on the previous 3 days, and that he had been released by his doctor and wanted his job back. The secretary said she did not know where Lenardson was and Barber left another message asking Lenardson to call him. Lenardson did not call him and sometime in December Barber began calling again. Although he made up to 10 phone calls over 4 or 5 days, Barber was unable to talk to Lenardson. In January 1982, Barber started calling again and

eventually the secretary offered to talk to Lenardson and tell him what Barber wanted. Barber called again and the secretary said Lenardson said to tell Barber that he was a union member, the Union was on strike, and, therefore, Barber was on strike. Barber called again a couple of days later but failed to reach Lenardson. On January 20 or 21, 1982, Lenardson called Barber and began the conversation by saying, "I don't have time to talk to you everyday when you call." He then said, "You are a Union member, the Union is on strike, therefore, you are on strike." He asked Barber why he had not come back to work after the doctor released him and Barber told him of his attempts to call him. Lenardson told Barber he would like to have him back but was "afraid of getting in trouble with the Labor Board" for negotiating with Barber rather than with the Union. He told Barber the best advice he could give him was to look for another job and Lenardson would give him a reference. Lenardson also said he would send Barber a letter stating why he could not take him back.

Barber applied for unemployment benefits which the Respondent opposed, contending that he was on strike and ineligible for such benefits. Barber's application was denied by the Michigan Employment Security Commission on the grounds that he was disqualified due to a labor dispute.

There is nothing in the record to indicate that at any time prior to defending this matter before the Board the Respondent ever contended that Barber has been terminated for his alleged failure to timely report for work following his medical leave. On the contrary, in all its dealings with Barber, including its oral and written communications with him and in defending against his claim for unemployment benefits, the Respondent consistently took the position that it considered Barber to be a striker and on that basis refused to reinstate him to his job. There is nothing in Barber's personnel file that supports the Respondent's contention concerning when and why he was terminated. Further, when Personnel Manager Lenardson was asked when Barber was terminated, he equivocated, stating, "He would have been terminated approximately two days after his date of return to work, which was certified by a doctor, I believe." He later became more emphatic, stating that Barber was terminated "two days after he failed to return from his medical

⁶ See Billion Oldsmobile-Toyota, 260 NLRB 745 (1982); Cable Vision, 249 NLRB 412 (1980).

⁷ The letter, dated January 21, 1982, states:

On the above date you called the Personnel Office wanting to know about your employment status. We were advised that effective October 30, 1981, in accordance with the examination by Larry Walton, M.D., that you were able to return to work and your weekly compensation benefits had been terminated. Since you did not return to work on November 2, you were presumed to be on strike.

In a telephone conversation with my secretary on this date, you indicated that after you were released for work on October 30, that because you were "afraid to cross the picket lines" [you] tried to call the office three times and were unable to reach me.

As soon as the strike began, Allegan County Sheriff's Posse members were placed on 24-hour duty at the front gate to assure the safety of employees' ingress and egress to and from the plant. For this reason, it is felt by the company that you [sic] decision not to cross the picket lines for whatever reason, constituted a waiver of your right to return to work and indicated that you were off work due to a Labor Dispute.

leave of absence." However, I do not credit Lenardson's self-serving remarks which are uncorroborated and which contradict his oral and written statements to Barber in January 1982 and before the Michigan Employment Security Commission concerning Barber's employment status. I therefore reject as a pretext the Respondent's belated, unsubstantiated, and contradictory claim that it terminated Mark Barber because he failed to report for work within 2 days of his medical release on October 30.

I credit Barber's statement in the charge he filed with the Board that he did not participate in the strike, as well as his testimony that he wanted to return to work after his medical release and that he made several telephone calls to the Company in an attempt to return to work, but that he was afraid to go to the plant because of the picket line he would have to cross. I find that, when Barber failed to cross the picket line following his medical release, the Respondent considered him to be a striker and terminated him at a time when he had not been permanently replaced. The Respondent candidly admitted this in Lenardson's comments to Barber on January 21, 1982, and in his letter of the same date, which states, "[It] is felt by the company that you [sic] decision not to cross the picket lines for whatever reason, constituted a waiver of your right to return to work and indicated that you were off work due to a Labor Dispute." By terminating Barber because it considered him to have participated in an economic strike, the Respondent discriminatorily discharged him in violation of Section 8(a)(3) of the Act. 9 The fact that Barber did not participate in the strike and remained away from his job because he was afraid to cross the picket line does not alter this conclusion. 10

There is no direct evidence of when the Respondent adopted its policy of terminating employees who refused to cross the picket line or when Barber was actually terminated. The "On Strike" and "Terminated 10-14-81" notations on several personnel file jackets in the record

suggest that anyone who did not come to work on the day after the strike began was considered a striker and. therefore, was terminated. A letter signed by Lenardson, found in the personnel file of employee Larry Sherer, contains the statements: "[T]he policy had been, and continues to be, that all persons who did not cross the picket lines as soon as they were physically able to do so are considered by the Company to be on strike" and "only those who had crossed the picket lines immediately, in spite of their feelings, were allowed to return to work." The Respondent offered no credible evidence that would indicate that this was not a correct statement of its policy with respect to those employees who did not cross the picket line. I conclude that Mark Barber, who was released by his physician to return to work as of Friday, October 30, and did not cross the picket line that day, would have been terminated on Monday, November 2, the next workday. Although I find that Barber, even though unaware that the Respondent considered him a striker, made, in effect, unconditional offers to return to work in his telephone calls to the Respondent's personnel office during the week of November 2, in mid-December, and on January 21, 1982, the futility of these actions has been clearly demonstrated. Under the circumstances, it was unnecessary for Barber to request reinstatement in order to activate the employer's backpay obligations. 11 Consequently, I find that the Respondent's backpay obligation began on November 2, 1981.

C. The Respondent's Affirmative Defense

The Respondent has alleged as an affirmative defense that the Union did not give it written notice of its desire to modify or terminate its contract as required in Section 8(d)(1) of the Act; that it went on strike in violation of Section 8(d)(4) of the Act; and that the employees who went on strike on October 13 lost their status as employees because they engaged in an unlawful work stoppage. It contends that "the charging parties are barred from relief in this proceeding on the record as it exists."

Even if such a defense were established, it would have no bearing on the violations of Section 8(a)(1) of the Act found herein. Insofar as its affirmative defense might affect the 8(a)(3) violation found herein, I find that this defense has not been established by a preponderance of the evidence. The Respondent in its brief notes that "the complete details of the dealings between Local 26 and the Respondent are not a part of the record." This is an understatement. The only evidence in the record bearing on this issue consists of the stipulation of the parties that a strike began on October 13 and the following testimony of Bruce Lenardson:

Q. [By Mr. Crocker] Did you receive from Local 26 the 60 days' notice of contract termination or request to modify this contract prior to October 13, 1981?

A. No, sir.

⁸ I find there is insufficient evidence to establish that the Respondent had a policy of terminating employees who did not report for work within 2 days of their release from medical leave. The only evidence of such a policy is the testimony of Lenardson that "according to our contract, an employee who is absent without calling in, without coming in, for two or more days is considered terminated." The "contract" he referred to was not introduced and, even if there were such a provision, I am not convinced that it would be applicable to the situation of an employee returning from medical leave. I did not believe Lenardson's testimony that other employees in circumstances similar to Barber's were terminated because they failed to report for work within 2 days after the date of their medical release. In the personnel file of one, Larry Sherer, a letter from Lenardson indicates that the Respondent took exactly the same position it did on Barber: "He is considered to be on strike and, as such, has no rights to work at Murco any more than any other striker.' The personnel files of the other employees Lenardson claimed were terminated pursuant to the same policy as Barber, Richard Bukowski and Terry Butcher, contain nothing that corroborates Lenardson's testimony. Interestingly, the personnel files of Sherer, Bukowski, and Butcher each have the notations "On Strike" and "Terminated 10-14-81" on the file jackets. Lenardson testified that the notations "don't really mean anything to me." The file jacket of Barber's file has the notation "Terminated 10-14-81" which has been crossed out. All of this casts considerable doubt on Lenardson's credibility and supports the inference that anyone who did not return to work after his medical release was considered by the Respondent to be on strike.

Scioto Coca-Cola Bottling Co., 251 NLRB 766 (1980).

¹⁰ See Congoleum Industries, 197 NLRB 534 (1972).

¹¹ See Abilities and Goodwill, 241 NLRB 27 (1979).

I do not consider this enough to deprive Barber of his status as an employee and the valuable rights pursuant thereto, which the Act protects.

To begin with, I find it insufficient to establish that the Union failed to give any required notice to the Respondent. The fact that Lenardson did not personally receive such a notice does not necessarily mean that the Respondent did not receive it. The question related only to whether Lenardson received a notice, not whether the Respondent did. There is also no evidence that Lenardson was the appropriate company representative to whom such notice would be sent. Next, it was not established that the Respondent had not given notice of its desire to modify or terminate the contract to the Union pursuant to Section 8(d)(1), 60 days prior to the date the strike commenced. There was evidence that the Respondent's president was unhappy with both the Union and "procedures" under the contract and evidence that negotiations were taking place before the strike began. The Respondent may very well have taken the lead in seeking to modify the contract. One side obviously notified the other that it wanted the contract modified or negotiations never would have started. If the Respondent gave the Union notice in accordance with Section 8(d)(1), the Union was not required to give any further notice to the Respondent.12 Since the contract is not in evidence, there is no indication of its expiration date and no way of telling if the strike began during the statutory "cooling-off" period. I find that that Respondent has failed to bear the burden of establishing that the strike was unlawful or that those employees, such as Barber, who failed to cross the picket line were lawfully terminated.

CONCLUSIONS OF LAW

- 1. The Respondent, Murco, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent violated Section 8(a)(1) of the Act by: (a) circulating and coercively soliciting employees to sign a petition to decertify the Union as their collective-bargaining representative, (b) encouraging employees to decertify the Union and bargain directly with the Respondent, and (c) soliciting employees to abandon the Union and promising them benefits for so doing.
- 4. The Respondent violated Section 8(a)(3) of the Act by discriminatorily discharging Mark Barber, whom it considered to have participated in an economic strike.
- 5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action in order to effectuate the policies of the Act

Having found that the Respondent unlawfully discharged Mark Barber, I shall recommend that the Respondent be ordered to offer him immediate and full reinstatement and to make him whole for any loss of earnings and other benefits he may have sustained because of the discrimination against him from the date of discharge, November 2, 1981, to the date that he is offered reinstatement. Backpay shall be computed in the manner prescribed in F. W. Woolworth Co., 90 NLRB 289 (1950), with interest to be paid on the amount due in accordance with Florida Steel Corp., 231 NLRB 651 (1977). 13

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER14

The Respondent, Murco, Inc., Plainwell, Michigan, its officers, agents, successors, and assigns, shall:

- 1. Cease and desist from:
- (a) Circulating and soliciting employees to sign petitions seeking to decertify their collective-bargaining representative.
- (b) Encouraging employees to decertify their collective-bargaining representative and to bargain directly with Respondent.
- (c) Soliciting its employees to abandon their collectivebargaining representative and promising them benefits for doing so.
- (d) Discouraging membership in or activities on behalf of United Food and Commercial Workers International Union, Local 26, AFL-CIO, or any other labor organization, by discharging employees or by otherwise discriminating against them in their hire or tenure of employment.
- (e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action designed to effectuate the purposes of the Act:
- (a) Offer Mark T. Barber immediate and full reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent positions, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings or other benefits he may have suffered by reason of the discrimination against him, in accordance with the recommendations set forth in the section of this decision entitled "The Remedy."
- (b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other

in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

¹² See Carpenters District Council of Denver (Rocky Mountain Prestress), 172 NLRB 793, 795, fn. 8 (1968); Ft. Smith Chair Co., 143 NLRB 514, 516-517 (1963).

¹³ See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).
14 In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided

records necessary to analyze the amount of backpay due under the terms of this Order.

- (c) Post at its Plainwell, Michigan, plant copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.
- (d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT circulate or solicit our employees to sign petitions to decertify their collective-bargaining representative.

WE WILL NOT encourage our employees to decertify their collective-bargaining representative and to bargain directly with us.

WE WILL NOT solicit our employees to abandon their collective-bargaining representative and promise them benefits for doing so.

WE WILL NOT discharge or otherwise discriminate against our employees in their hire or tenure of employment in order to discourage membership in or activities on behalf of United Food and Commercial Workers International Union, Local 26, AFL-CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Mark T. Barber immediate and full reinstatement to his former position or to a substantially equivalent position and WE WILL make him whole for any loss of earnings or other benefits he may have suffered by reason of the discrimination against him, with interest.

Murco, Inc.

¹⁵ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."